Supreme Court, U.S.
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# In The
# Supreme Court of the United States
## October Term, 1997

ERIE ADAMS
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit
Case № 96-2291

## PETITION FOR WRIT OF CERTIORARI
with Appendix

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## QUESTIONS PRESENTED

I.

Does this Court have jurisdiction to vacate the sentence for a pre-*Bailey* plea based conviction to a violation of 18 U.S.C. § 924(c)(1) where (a) the plea was involuntary as a result of misinterpretation of the section 924 (c)(1) statute; (b) Petitioner's section 2255 motion has been denied by the district court, and (c) Petitioner's application for a certificate of appealability has been denied by the court of appeals?

II.

If so, was Petitioner's pre-*Bailey* plea to using and carrying firearms during and in relation to a drug trafficking offense involuntary where Petitioner denied use and carry "in relation to" a drug trafficking offense at the plea taking and where the district court fused the elements of the statute together so as to accept a plea for possession of firearms during a drug trafficking offense?

## PARTIES TO THE PROCEEDINGS

The parties to this proceeding are: (1) United States who was Plaintiff in the district court criminal action, Respondent in the section 2255 proceedings, and Appellee in the court of appeals, and (2) Erie Adams who was Defendant in the district court criminal action, Petitioner in the section 2255 proceedings, and Appellant in the court of appeals.

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NO.

In The
Supreme Court of The United States
October Term 1997

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ERIE ADAMS,
*Petitioner,*
v.

UNITED STATES OF AMERICA,
*Respondent,*

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner Erie Adams respectfully prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding denying Petitioner's application for a certificate of appealability with respect to a *Bailey* issue brought pursuant to Petitioner's first section 2255 motion

under 28 U.S.C. § 2255.[1] Certiorari is requested regarding an important federal question decided by a United States court of appeals in a way that conflicts with relevant decisions of this Court.

## OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit (denying Petitioner's application for a certificate of appealability) that gives rise to this Petition is not published and is reprinted at A1. By unpublished Order dated January 28, 1998, the Sixth Circuit denied Petitioner's Petition for Rehearing. This Order is reprinted at B1. The Order of the District Court denying Petitioner's section 2255 motion is unpublished and reprinted at C1.

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[1] *Bailey v. United States*, 516 U.S. 137 (1995).

## JURISDICTION

The Order of the Sixth Circuit denying Petitioner's application for a certificate of appealability was entered May 16, 1997. The Sixth Circuit denied Petitioner's timely-filed Petition for Rehearing on January 29, 1998. Pursuant to 28 U.S.C. § 2101(c) and Rule 13.3, Supreme Court Rules, this Petition for Certiorari has been filed within 90 days of the date of denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS AND COURT RULES INVOLVED

28 U.S.C. § 2253(c)(1) and (2) provide:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> (A) the final order in a habeas corpus proceeding

> in which the detention complained of arises out of process issued by State court; or
>
> (B) the final order in a proceeding under § 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

———♦———

18 U.S.C. § 924(c)(1) provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United

States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, . . . nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

———♦———

Fed.R.Crim.P. 11(d), (f) provides:

(d) **Insuring That the Plea is Voluntary.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to

whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

* * *

(f) **Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

## STATEMENT OF THE CASE

Petitioner was indicted in the Eastern District of Michigan on December 17, 1992, for various offenses, including conspiracy to distribute cocaine, 21 U.S.C. §§ 864, 841; use and carrying firearms during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1), and felon in possession of firearms, 18

U.S.C. § 922(g)(1).[2] He pled guilty on April 26, 1993, to the above and other related charges.[3] Petitioner was sentenced on July 22, 1993, to 60 months under section 924(c)(1), consecutive to the 87 month sentence on the remaining counts. No direct appeal was taken from the plea or sentence.

The factual basis for Petitioner's plea to section 924(c)(1) was possession of a gun during drug trafficking. D17-D18. During the plea proceedings, Petitioner stated that he did not carry a gun "in relation to" a drug trafficking offense as required by 18 U.S.C. § 924(c)(1), *id.*, but admitted that he carried a gun "during" a drug trafficking offense. D18. The record below also indicates that Petitioner did not "use" a gun during or in relation to the drug trafficking offense. District Court Order at C2.

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[2] The district court had jurisdiction of this criminal case by virtue of 18 U.S.C. § 3231.

[3] The plea transcript is reprinted at D1. The Indictment was read into the plea transcript and may be referred to therein at D4-D11.

At the time of this pre-*Bailey* plea, the Sixth Circuit applied a broad definition of "use" under section 924(c)(1), *United States v. Moore*, 76 F.3d 111, 112 (6th Cir. 1996). As the Sixth Circuit has recently recognized with respect to pre-*Bailey* pleas in the Sixth Circuit:

> **it is clear that the court, counsel, and the accused were all operating under what we now know was a too-inclusive view of § 924(c)'s reach.**

*In Re Hanserd*, 125 F.3d 922, 927 (6th Cir. 1997).

After *Bailey* was decided, Petitioner brought a first section 2255 motion in the district court on May 23, 1996, alleging in summary that the plea was entered and accepted by the district court under a too-inclusive view of section 924(c)'s reach, resulting in an involuntary plea. The motion was denied in the district court's Order on the ground that, while Petitioner did not use a gun under *Bailey*, based on a "preponderance," he carried a gun in

relation to a drug trafficking offense. C5.[4]

In the interim between *Bailey* and Petitioner's section 2255 motion, in April, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter "AEDPA"]. The AEDPA placed restrictions on the right to appeal a final order in a section 2255 proceeding, including a certificate of appealability and a substantial constitutional violation as opposed to a statutory violation, 28 U.S.C. § 2253(c)(1), (2).

Petitioner's application for a certificate of appealability was denied by a panel of the Sixth Circuit in an

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[4] The facts regarding the drug offense are summarized in the district court's Order regarding pre-trial detention of Petitioner. E1. In brief, Petitioner drove a van and parked it on the street in proximity to a house where a drug transaction was to occur. Inside the passenger compartment of the van was a firearm, and another firearm was found on the street after agents apprehended Petitioner. Petitioner went to the area to collect money proceeds from the drug transaction. Plea Transcript at D16.

order stating:

> [u]pon review, the application for a certificate of probable cause is hereby denied.

A-1. While the application for a certificate of appealability was pending, another panel of the Sixth Circuit again acknowledged the pre-*Bailey* errors in the Sixth Circuit and held that

> coincidental or accidental placement of a firearm near cash or drugs is insufficient to sustain a conviction under § 924(c)

because the gun is not carried in relation to the drug crime. *United States v. Malcuit*, 104 F.3d 880, 884-86 (6th Cir. 1997), citing *Smith v. United States*, 508 U.S. 223 (1993).[5] This case supportive of Petitioner was cited in the petition for rehearing. The petition for rehearing was also denied without further explanation. B1.

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[5] Petitioner's plea was also entered prior to this Court's decision in *Smith*.

Petitioner, as did many others in the Sixth Circuit, entered a plea to section 924(c)(1) in a district court that assumed the elements of the offense are satisfied by possession of a gun during a drug trafficking offense. As stated by the Sixth Circuit in *Malcuit, supra:*

> . . .some of our pre-*Bailey* opinions appear to fuse 'use' and 'carry' into a single requirement, and then to find this requirement satisfied by mere possession.

104 F.3d at 884-85. The result was an involuntary plea in this case and, after denial of Petitioner's section 2255 motion by the district court, inability to obtain appellate review. This Petition is filed because the rejection of Petitioner's efforts to set aside a plea based conviction for section 924(c)(1) conflicts with relevant decisions of this Court.

This Court has granted certiorari in three cases now pending which impact on this Petition. In *Hohn v. United States, cert. granted,* No. 96-8986, 118 S. Ct.

361 (October 31, 1997), issues are raised as to whether this Court has jurisdiction to grant certiorari, vacate and remand a *Bailey* case after denial of a certificate of appealability by the court of appeals per the suggestion of the Acting Solicitor General. In *Muscarello v. United States*, and *Cleveland v. United States*, certiorari was granted with respect to definition of the "carry" prong in section 924(c)(1). Nos. 96-1654, 96-6837, 118 S. Ct. 621 (December 12, 1997). In *Bousley v. Brooks*, *cert. granted*, No. 96-8516, 118 S. Ct. 31 (September 29, 1997), questions posed relate to the scope of *Bailey's* retroactively when applied to a defendant who has pled guilty.

**REASONS FOR GRANTING THE PETITION**

The Sixth Circuit has stated that *Bailey* held that the lower courts:

> this [Sixth] Circuit included, had been sustaining convictions under

> section 924(c) for conduct that was not illegal.

*In Re Hanserd*, *supra*, 123 F.3d at 924. The district court in this pre-*Bailey* case also accepted Petitioner's plea under a too inclusive interpretation of section 924(c)(1). Petitioner's prophetic denial of guilt at the plea hearing, based on a less inclusive view of section 924(c)(1), was later confirmed by *Bailey* and its progeny.

At the plea hearing, Petitioner denied that he carried guns for the purpose of drug trafficking:

> Defendant: Yes
> I have been shot twice, your Honor, that's why I was carrying them.
> Court: You were carrying these weapons for what purpose?
> Defendant: Can I say something.
> Court: Certainly.
> Defendant: When you are dealing with drugs, you don't need firearms.
> Court: You don't need firearms when you are dealing with drugs?
> Defendant: No, you do not.

> Court: Why do so many carry them?
>
> Defendant: I carried firearms because I have been shot twice. That's why I was carrying it.

D17-D18. The district court made no further inquiry into the "use," "carry" or "in relation to" prongs as used in 18 U.S.C. § 924(c)(1). *Id.* Instead, the district court focused on the "during" the course of prong and fused guilt into possession of a firearm during a drug trafficking offense. D18; *see Malcuit, supra*, 104 F.3d at 884-85. The district court, in response to Petitioner's denials regarding "in relation to," established that Petitioner carried firearms "during" the course of drug trafficking:

> Court: Well, you were carrying them while you were dealing drugs, to protect yourself, is that right?
>
> Defendant: Right.
>
> Court: That takes care of that.

D18.[6] The above colloquy does not establish whether Petitioner was protecting himself regarding drug trafficking or non-drug related matters. Indeed, Petitioner had expressly denied any relationship between drugs and firearms earlier in the colloquy. D17-D18. More importantly, when Petitioner actually entered the plea, the following colloquy occurred:

> The Court: How do you plead to count three, which charges you with the use and carrying a firearm **during** drug trafficking?
>
> The Defendant: Guilty.

D14. Clearly, the district court focused solely on the use, carry and during prongs of section 924(c)(1), and ignored the "in relation to" prong.

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[6] It is clear from the text of the plea transcript that "carried" meant to possess. To the extent that "carries" under section 924(c)(1) means mere possession, Petitioner carried a gun. To the extent that "carries" means more than mere possession, Petitioner defers to the upcoming decision of this Court in *Muscarello* and *Cleveland, supra*, and reserves the issue as to whether or not Petitioner carried a gun.

A guilty plea is involuntary where the defendant lacks knowledge of one of the elements required for conviction. *Henderson v. Morgan*, 426 U.S. 637, 644-45 & n. 13 (1976). Petitioner's plea was involuntary because the district court did not clarify the issues of law in relation to the facts at this pre-*Bailey* plea and because Petitioner denied that the weapons were related to drugs.

The resolution of "in relation to" must depend on **why** the defendant possessed the firearm, a question of subjective intent. The weapon must have "some purpose or effect with respect to" and is meant to facilitate the drug trafficking offense. *Smith v. United States, supra*, 508 U.S. at 238. Because the Sixth Circuit had fused the separate prongs of section 924(c)(1) into possession of a firearm during drug trafficking, the district court nevertheless accepted the plea. When the district court accepted Petitioner's plea, it had a duty under Fed.R.Crim.P. 11 to ensure that the plea was both voluntary, Fed.R.Crim.P. 11(d),

and supported by a sufficient factual basis, Fed.R.Crim.P. 11(f). In light of *Bailey*, the district court failed in that duty. *In Re Hanserd, supra*, 123 F.3d at 927.

Petitioner did not take a direct appeal in 1993 because it was only after this Court decided *Bailey* in 1995 that the plea taking could be challenged as involuntary. In addition, it was only in the aftermath of *Bailey* that the Sixth Circuit conceded that the district courts had been fusing the section 924(c)(1) offense into elements of possession during a drug trafficking crime.

When the district court ruled on the section 2255 motion, it appeared to balance the facts to determine if some factual basis supported the plea and then concluded there was a "preponderance" in favor of guilt. C5. The problem with this approach is that it assumes that the Court, Petitioner and counsel had an understanding of the law in relation to the facts at the time of the plea. They clearly did not. Petitioner's statements

at the plea indicate that he was denying use and/or carry "in relation to" drugs. The district court felt that use or carry during a drug offense was sufficient and "that takes care of that." D18. Petitioner was forced to accept the district court's view and the district court and counsel ignored Petitioner's intent in possessing the guns. As stated in *Henderson v. Morgan, supra*, where this Court vacated a plea based conviction to second degree murder:

> There is nothing in the record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. . . In these circumstances it is impossible to conclude that his plea. . . was voluntary.

426 U.S. at 646.[7]

---

[7] The district court also stated in its Order that Petitioner drove to the location of the drug transaction "with the cocaine and the weapon" and then concluded by a preponderance that Petitioner carried a firearm in relation to

(continued...)

The Sixth Circuit did not give any reasons for denial of Petitioner's certificate of appealability. Petitioner submits that the colloquy at his plea which fused the elements of section 924(c)(1) into possession during a drug trafficking offense, and his denial of the "in relation to" prong at the time of plea, make a substantial showing of denial of a constitutional right, as required for a certificate of appealability in 28 U.S.C. § 2253(c)(2). Petitioner's plea was involuntary and the

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[7](...continued)
trafficking offense. C5. A cocaine with the gun theory, in the absence of a jury trial finding, is not a substitute for the lack of intent expressly set forth by Petitioner at the plea. *See Henderson v. Morgan, supra.* The cocaine with the gun statement is also in error as the record below does not support the statements of the district court and the government. The lead surveillance officer testified at the detention hearing that surveilling agents did not observe any narcotics on Mr. Adams when he went from the van to the house. F3-F4. Neither the plea transcript (D1) or the district court's rendition of facts in the detention order (E1) support the conclusion that Petitioner carried the cocaine to the scene.

judgment of conviction was entered "without due process of law." *Henderson v. Morgan, supra,* 426 U.S. at 647.

Without more from the Sixth Circuit, Petitioner can only assume that his application for a certificate was denied on the ground that it raised a statutory violation under section 924(c)(1), *see Hohn, supra,* or because Petitioner did not file a direct appeal from the plea, *see Bousley, supra,* or because Petitioner's attempt to make use of *Bailey* introduces a lack of finality into guilty pleas, *see Bousley, supra.* The panel decision of the Sixth Circuit also conflicts with *Bailey, supra; Smith v. United States, supra,* and *Henderson v. Morgan, supra.*

Unlike 28 U.S.C. § 2244(b)(2)(E),[8] 28 U.S.C. § 2255 does not bar a petition for writ of certiorari with respect to denial

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[8] This section bars petitions for rehearing and petitions for a writ of certiorari with respect to denial by a court of appeals of a certificate to file a second or successive 2255 petition.

of a certificate of appealability by a court of appeals. Petitioner submits that this Court may therefore grant relief to Petitioner as in any case in which a defendant has a right to file a petition for certiorari. The relief which Petitioner seeks is to have his section 924(c)(1) sentence and conviction vacated or, in the alternative, a remand to the Sixth Circuit to hear Petitioner's appeal of the denial of his section 2255 motion.

The section 924(c)(1) charge against Petitioner should have been submitted to a jury. The district court should not have accepted this plea where Petitioner pointedly denied an element of the offense. The district court did not purposely take an invalid plea. This was pre-*Bailey*. Many of the events here were standard operating procedure in the Eastern District of Michigan pre-*Bailey* where section 924(c)(1) pleas were taken based upon possession of a gun during a drug trafficking crime. However, the intent of Petitioner regarding use and

carry "in relation to. . ." is paramount and Petitioner expressed his intent at the plea. The district court's rendition of facts (in the Order Denying Section 2255 Motion, C1) portrays Petitioner as guilty of a section 924(c)(1) violation based on a "preponderance" of facts, C5, and overlooks the fact that a guilty plea must be made knowingly and voluntarily. Petitioner's clear and unequivocal expression of a lack of intent to possess the guns in relation to drug trafficking negates a voluntary plea based on a knowledge of the law in relation to the facts. *Henderson v. Morgan, supra*.

**CONCLUSION**

For the foregoing reasons, this Court should grant this Petition and issue a writ of certiorari vacating the sentence and conviction of Petitioner or, in the alternative, remand to the Sixth Circuit and order the entry of a certificate of appealability.

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Dated: April 10, 1998

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**6TH CIRCUIT FILINGS:**

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**EASTERN DISTRICT OF MICHIGAN FILINGS:**

Order Denying Section 2255 Motion, filed 8/2/96 . . . . . C1-C10

Plea Hearing Transcript, filed 8/30/96 . . . . . D1-D31

Order Denying Motion for Revocation of Pretrial Detention, filed 1/11/93 . . . . . E1-E5

Excerpts from Transcript of Detention Hearing Held 12/10/92, filed 12/15/92 . . . . . F1-F6

# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER DENYING
CERTIFICATE OF APPEALABILITY

Sixth Circuit Case №. 96-2291
Filed May 16, 1997

Pages A-1 thru A-1

№. 96-2291

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| **ERIE ADAMS** | ) | |
| ***Plaintiffs-Appellant,*** | ) | |
| | ) | |
| **v.** | ) | ORDER |
| | ) | |
| **UNITED STATES OF AMERICA,** | ) | |
| ***Defendants-Appellee.*** | ) | |

Filed May 16, 1997

Erie Adams appeals a district court judgement denying his motion to vacate sentence filed under 28 U.S. C. § 2255. The receipt of the notice of appeal has been construed as an application for a certificate of appealability. *Cf.* Fed. R. App. P. 22(b). Upon review, the application for a certificate of probable cause is hereby denied.

ENTERED BY ORDER OF THE COURT

6th Circuit
Court of Appeals
Filed 5/16/97

/s/ Leonard Green
Clerk

# APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER DENYING
PETITION FOR REHEARING

Sixth Circuit Case №. 96-2291
Filed January 29, 1998

Pages B-1 thru B-1

№. 96-2291

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

| | | |
|---|---|---|
| **ERIE ADAMS** | ) | |
| ***Plaintiffs-Appellant,*** | ) | |
| | ) | |
| **v.** | ) | **ORDER** |
| | ) | |
| **UNITED STATES OF AMERICA,** | ) | |
| ***Defendants-Appellee.*** | ) | |

Filed January 29, 1998

Petitioner Erie Adams petitions for rehearing of this ccourt's order of May 16, 1997, which denied Adam's application for a certificate of appealability to appeals a district court order denying his motion to vacate sentense filed under 28 U.S.C. § 2255.

Upon consideration, the court has concluded that is did not act under any misapprehension of law or fact in its order entered May 16, 1997. Fed. R. App. P. 40(a) Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

6th Circuit
Court of Appeals
Filed 1/29/98

# APPENDIX C

UNITED STATES COURT OF APPEALS
FOR EASTERN DISTRICT OF MICHIGAN

ORDER DENYING
SECTION 2255 MOTION

Sixth Circuit Case №. 96-2291
Filed August 2, 1996

Pages C-1 thru C-10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Eastern Dist. of Michigan Filed 8/2/96

| | | |
|---|---|---|
| ERIE ADAMS, *Petitioner,* | ) | Criminal Case No. 92-CR-81100 |
| vs. | ) | Civil Case No. 96-CV-72424 |
| UNITED STATES OF AMERICA, *Respondent.* | ) | Honorable Robert E. DeMascio |

**ORDER**

This matter is before the court on petitioner's motion under 28 U.S.C. § 2255. On December 8, 1992, petitioner was indicted on various drug related crimes. On April 26, 1993, petitioner pled guilty to the following offenses: Count I, conspiracy to possess with intent to distribute cocaine, in violation of 18 U.S.C. 846; Count III, use or carrying a firearm, in violation of 18 U.S.C. § 924(c)(1); Count V, assaulting a federal agent, in violation of 18 U.S.C. § 111; and Counts VI, VII and IX, felon in possession of firearm, in violation of 18 U.S.C. § 922(g). On July 22, 1993, petitioner was sentenced to 87 concurrent months on Counts I, VI, VII and IX and 60 consecutive months on Count III.

Petitioner asserts two grounds for collateral relief. First, that his conviction and sentence under § 924 (c)(1) must be vacated in light of Bailey v. United States, 116 S.Ct. 508 (1996). Second, that his conviction and sentence under § 111 should be vacated because his guilty plea was not knowingly and intentionally made and because the sentence was improperly enhanced.

As to petitioner's Bailey claim, the government concedes that petitioner did not "use" any of the firearms under the Supreme Court's interpretation in Bailey. However, we must consider whether he "carried" any of them.[1] In United States v.- Riascos-Suarez, 73 F.3d 616 (6th Cir. 1996), and in United States v. Moore, 76 F.3d 111 (6th Cir. 1996), the Sixth Circuit addressed the meaning of "carry" under section 924(c)(1) after Bailey. In Riascos-Suarez, the court held that "in order for a defendant to be convicted of carrying a gun in violation of section

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[1]18 U.S.C. § 924(c)(1) provides in relevant part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . uses or carries a firearm, shall . . . be sentenced to imprisonment for five years." 18 U.S.C. § 924(c)(1) (emphasis added).

924 (c)(1), the firearm must be immediately available for use--on the defendant or within his or her reach." Id. at 623. The court noted that this definition "takes the weapon beyond mere possession or storage." Id. In Moore, the court clarified the definition of "carry," in Riascos-Suarez stating: "[a]lthough the immediate availability of the gun to the appellant was a key factor in Riascos-Suarez, we do not read that case as identifying availability as the *only* relevant consideration . . . . A definition of 'carry' that takes only availability into account ignores that term's most obvious connotation, i.e., physical transportation." Moore, 76 F.3d at 113.

Application of the above definitions here indicates that petitioner "carried" the firearm found in his van. The ATF agent testified that a weapon was located in the passenger compartment, and was thus available and within petitioner's reach during the drug transaction as required by Riascos-Suarez. In addition, the weapon was carried within the definition in Moore, as petitioner physically transported it, in his van to the location of the drug transaction. Indeed, it would be difficult to imagine a more clear case of "carrying" under

these two Sixth circuit opinions than the facts here. Taking a weapon along to the scene of a drug transaction appears to be exactly the type of conduct that the Sixth Circuit envisions as "carrying" under section 924(c)(1).

However, petitioner also contends that the weapons were not carried "in relation to" a drug trafficking offense. Specifically, petitioner contends that because the cocaine was not found in the car with the weapon, the weapon was not carried in relation to the crime of possession, citing Riascos-Suarez. While in Riascos-Suarez the court held that the weapon located on the vehicle's seat console was not carried "in relation to" the crime of possession because no drugs were found in the car with the weapon," petitioner here was not charged with possession of cocaine, but rather with conspiracy to possess with intent to distribute cocaine.[2] In order to establish that the firearm was carried "in relation to" a drug trafficking offense, the firearm must have furthered the purpose or effect of the crime and

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[2]The court in Riascos-Suarez concluded that defendant carried the firearm located on the seat console of the vehicle "in relation to" the crime of conspiracy. 73 F.3d at 624.

that the presence or involvement was not the result of coincidence. Smith v. United States, 508 U.S. 223 (1983); United States v. Brown, 915 F.2d 219, 223 (6th Cir. 1990). Although during his plea petitioner stated that "when you are dealing with drugs, you don't need firearms," he admitted that he carried weapons while dealing drugs for protection. (Plea transcript at 16-17). Here, the conspiracy was ongoing, beginning when petitioner drove to the location with the cocaine and weapon, and was not yet completed when he carried the weapon for protection. From this it was reasonable for the court to conclude by a preponderance that the weapon in his van furthered the crime of conspiracy, using it to protect himself during the drug deal. Thus, petitioner's conviction and sentence under § 924(c)(1) is valid even after the holding in Bailey .

Petitioner's arguments regarding his conviction under § 111 (assault on a federal agent) do not have merit. Petitioner first contends that his plea was not voluntary because he "expressed confusion as to the charge in count 5," repeatedly indicating that he did not know the individual he assaulted was an agent. However, as petitioner points out, a defendant need not be aware that

the agent is in fact an agent in order to be guilty of violating section 111. United States v. Fiola, 420 U.S. 671 (1975). Thus, it is difficult to see how his plea was not voluntary. Even assuming, arguendo, that he was confused about the lack of specific knowledge, he still admitted to engaging in the conduct which is in violation of section 111 -- assaulting an agent. It also appears clear from the plea colloquy that petitioner understood the nature of the charge and how his conduct was in violation of section 111.

In addition, petitioner cannot prevail on his next argument that the three point sentencing enhancement to count V was improper.[3] Petitioner,

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[3]The Sentencing Guidelines provide for a three point enhancement if the defendant's actions were motivated by the status of the victim as a federal officer. The Probation Department, in the Presentence Report, calculated petitioner's sentence under Count V to include the three level enhancement pursuant to U.S.S.G. § 3A1.2(a), which provides:

> If--
> (a) the victim was a governmental officer or employee . . .and the offense of conviction was motivated by such status or (b)

through counsel, asserted this same argument in his presentence objections. Nevertheless, we have found that there was ample evidence to support a finding that petitioner knew the agent was in fact an agent at the time of the assault. The court recited this evidence in an order of January 11, 1993, affirming the magistrate's order of detention. Indeed, a review of the events surrounding petitioner's arrest reveals that it was more than reasonable to conclude that petitioner knew the agent was in fact an agent and that petitioner's actions were either motivated by the agent's status or were such to create a substantial risk of bodily harm. As the court noted in its January 11, 1993 order:

> They [the agents] were wearing raid uniforms which identified then as "ATF." Other agents involved in the arrest were

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> during the course of the offense or immediate flight therefrom, the defendant . . . knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury.

> similarly identified. Branden [the agent involved in the assault] approached defendant's van, shouting "Police" and ordered defendant to exit the van. Instead, defendant put his vehicle in reverse and started to back up. Branden attempted to remove the ignition key but defendant continued his backward movement. Branden then attempted to grab defendant's hair, but defendant refused to stop. Defendant then put his vehicle in, forward and started to drive away. Branden hung on the side of the van as defendant was increasing his speed driving over various curbs and lawns to effect his escape. Seeing the defendant reach for a gun on the seat, Branden fired one round into the car. He then lost his grip and fell to the street, injuring his head and hands.

(Order at p. 3) Thus, there was ample factual support for the probation officer's conclusion to apply the sentencing enhancement.

Moreover, petitioner's argument fails on procedural grounds. Courts have held that errors in the application of the sentencing guidelines rarely give rise to § 2255 claims. Scott v. United States, 997 F.2d 340 (7th Cir. 1993)(only extraordinary circumstances warrant review of sentence guideline violations); United States v. Grant, 72 F.3d 503 (6th Cir. 1996). The court in Grant held that "when a federal statute, but not the Constitution, is the basis for post conviction attack, collateral relief from a defaulted claim of error is appropriate only where there has been fundamental unfairness, or what amounts to a break-down of the trial process." Id. at 506. That is clearly not the case here. While the presentence report does include the three point enhancement in calculating his sentence, petitioner was sentence under the Rule 11 agreement. The Sentencing Worksheets attached to the Rule 11 agreement indicate that this three point enhancement was not even applied in arriving at petitioner's agreed upon sentence. Thus, even if the probation department erred in applying the three point enhancement (which they

did not), that error in no way impacted petitioner's sentence.[4]

Finally, petitioner is also barred from asserting this argument for the first time on collateral attack because her has not demonstrated cause and prejudice from his failure to raise it on direct appeal. United States v. Frady, 456 U.S. 152, 167-69 (1982); Ratliff v. United States, 999 F.2d 1023 (6th Cir. 1993).

ACCORDINGLY, **IT IS ORDERED that petitioner's motion is DENIED.**

/s/ Robert E. DeMascio
Robert E. DeMascio
United States District Judge

Dated: Aug. 2, 1996

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[4]We also note that the Rule 11 agreement provided a maximum term of incarceration of 87 months plus five years consecutive; the probation department's calculations provided a range of 121 to 151 months. Thus, because petitioner received a real benefit from the Rule 11 agreement, he cannot seriously claim that the alleged sentencing error resulted in fundamental unfairness.

# APPENDIX D

UNITED STATES COURT OF APPEALS
FOR EASTERN DISTRICT OF MICHIGAN

PLEA HEARING
TRANSCRIPT

Sixth Circuit Case №. 96-2291
Filed August 30, 1996

Pages D-1 thru D-31

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | | |
|---|---|---|
| ERIE ADAMS, *Petitioner,* | ) | Criminal Case No. 92-CR-81100 |
| vs. | ) | Plea Hearing |
| | ) | Honorable Robert E. DeMascio |
| UNITED STATES OF AMERICA, *Respondent.* | ) | Eastern Dist. of Michigan Filed 8/30/96 |

Proceedings had in the above entitled cause before the HONORABLE Robert DeMascio; United States District court Judge, at 272 United States Court-house, Detroit, Michigan, on Monday, April 26, 1993.

APPEARANCES:

For the Government:

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Official Court Reporter:

BARBARA C. CHATMAN, CSR-0077
277 U. S. Courthouse, Detroit, MI 48226

Detroit, Michigan
Monday, April 26, 1993

- - -

THE CLERK: All rise, please. Court is in session.

THE COURT: Sit down, please.

THE CLERK: Case No.92-81100, United States of America versus Erie Adams.

MS. DONOHUE: Afternoon, your Honor. Diane Donohue appearing on behalf of the United States.

MR. MANN: Robert Mann on behalf of Mr. Erie Adams, your Honor, and Milton Henry for the respondent as well.

THE COURT: Let's see.

Mr. Adams --

THE DEFENDANT: Yeah.

THE COURT: Would you raise your right hand, please?

THE DEFENDANT: Yeah.

**ERIE ADAMS,**

having been first duly sworn, was examined and testified upon his oath as follows:

THE COURT: How old are you?

THE DEFENDANT: Yes, sir, 37.

THE COURT: Thirty-seven?

THE DEFENDANT: Yes.

THE COURT: How far did you go in school?

THE DEFENDANT: Eleventh grade.

THE COURT: Where?

THE DEFENDANT: Caffney (ph.).

THE COURT: Presently, are you under the under the care of a psychologist, psychiatrist or doctor of any kind?

THE DEFENDANT: No, I am not.

THE COURT: Presently, have you been taking drugs or medication of any kind?

THE DEFENDANT: No.

THE COURT: Do you feel you are capable of understanding, communicating with the Court today relative to all the matters pertaining to Counts One, Three, Five, Six, Seven and Nine of this Indictment?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you feel that is true, Counsel?

MR. MANN: Yes, your Honor.

THE COURT: Your counsel is by your side?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with their services?

THE DEFENDANT: Yes.

THE COURT: Do you feel that you have had all the time that you feel is necessary to discuss these matters with them prior to coming here today?

THE DEFENDANT: Yes.

THE COURT: Let's take a look at these several counts. Count One charges

you with -- This is not the same Indictment as Mr. Johnston, is it?

MS. DONOHUE: Yes, it is, your Honor.

THE COURT: All right. Is Mr. Johnston here?

THE DEFENDANT: No. He is back there.

THE COURT: Bring them up here.

MS. DONOHUE: Apparently they are waiting for Mr. Hall to come, who is also Mr. Johnston's attorney.

THE COURT: All right.

Mr. Adams, let's read these several counts.

Count One charges you with a conspiracy to distribute cocaine, and it reads in part as follows:

> "That on or about November 28, 1992, in the Eastern District of Michigan, Southern Division, and elsewhere, ERIE ADAMS, ALBERT JOHNSTON, LOUIS HOLMES, and GREGORY HOLMES, defendants herein, did knowingly, intentionally, and unlawfully, combine, conspire, confederate, and agree with each other and with other persons, whose names are both known and unknown to the grand jury, to commit offenses

against the United States, that is, to distribute cocaine, a Schedule II Controlled Substance, contrary to the provisions of Title 21, United States Code, Section 841 and 846.

"It was part of said conspiracy that various co-conspirators obtained three kilogram quantities of cocaine for distribution in the Eastern District of Michigan."

I am going to have to read all of this all over again to this other man?

MS. DONOHUE: I apologize. We did try to have them all scheduled together at the same time. Apparently the attorney got hung up. He also got six counts.

Mr. Johnston is only pleading to one, your Honor.

THE COURT: Terrific.

". . . obtained three kilogram quantities of cocaine for distribution in the Eastern District of Michigan. Once said cocaine had been obtained, various members of the conspiracy transported the cocaine to a distribution location in Detroit, Michigan.

"Various individuals were used to physically deliver the cocaine to customers and to collect the proceeds of said distribution, again utilizing a distribution location in Detroit, Michigan.

"It was the role of ERIE ADAMS in the conspiracy to make arrangements for and negotiate the sale and distribution of the three kilograms of cocaine. ERIE ADAMS would also collect the proceeds of the cocaine distribution. It was also the role of ERIE ADAMS to supervise other conspirators in the aforementioned unlawful activities, and to provide armed protection of the distribution of the cocaine.

"It was the role of ALBERT JOHNSTON in the conspiracy to physically distribute the cocaine and to arrange for the transfer of proceeds from said distribution. It was also the role of ALBERT JOHNSTON to maintain communications with ERIE ADAMS during the distribution of said cocaine.

"It was the role of LOUIS HOLMES and GREGORY HOLMES in said conspiracy to utilize their residence at 11712 Wayburn, Detroit, Michigan, for the purpose of storing and selling cocaine and also for collecting cocaine trafficking proceeds."

"All in violation of Title 21, United States Code, Sections 841 and 846."

Count Three charges you, Mr. Adams, denominated as Use and Carrying of Firearms During Drug Trafficking, and reads in part as follows:

"That on or about November 28, 1992, in the Eastern District of Michigan, Southern Division, ERIE ADAMS, defendant herein, did knowingly and unlawfully use and carry the following firearms:

"One loaded Glendel .380 caliber semi automatic pistol, bearing serial number 23921;

"One loaded Beretta 9 millimeter semi automatic pistol, bearing serial number BER160264Z; during and in relation to a drug trafficking crime, as defined by Title 18,

United States Code, Section 924(c)(2), to wit: Distribution of Cocaine; in violation of Title 18, United States Code, Sections 924(c)(1) and 2."

Count Five is denominated as Assaulting or Impeding a Federal Agent and reads in part as follows:

"That on or about November 28, 1992, in the Eastern District of Michigan, Southern Division, ERIE ADAMS, defendant herein, did knowingly, intentionally and unlawfully use a deadly or dangerous weapon, to wit: a Chevrolet Lumina van, to forcibly assault, resist, oppose, impede, and interfere with Special Agent Thomas Brandon of the United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, while such agent was engaged in and on account of the performance of official duties; in violation of Title 18, United States Code, Section III."

You are also charged in Count Six, and it reads in part as follows. It is called a Felon in Possession of Firearms:

"That on or about November 28, 1992, in the Eastern District of Michigan, Southern Division, ERIE ADAMS, defendant herein, having previously been convicted of a crime punishable by a term of imprisonment exceeding one year, to wit: carrying a concealed weapon, did knowingly and unlawfully possess firearms, that is, one loaded Glendel .380 caliber semi automatic pistol, bearing serial number 23921 and one loaded Berreta 9 mm semi-automatic pistol, bearing serial number BER160264Z, said firearms having previously traveled in interstate commerce; in violation of Title 18, United States Code, Section 922(g)(1)."

Count Seven charges you with a Felon in Possession of Firearms and reads in part as follows:

"That on or about November, 1992, in the Eastern District of Michigan, Southern Division, ERIE ADAMS, defendant herein, having been previously convicted of a crime punishable by a term of imprisonment

exceeding one year, to wit: carrying a concealed weapon, did knowingly and unlawfully possess firearms, that is,

"one Browning magnum .12 gauge shotgun bearing serial number 70969;

"one loaded IMI Desert Eagle 44 magnum semi-automatic pistol having an obliterated serial number;

"one loaded Sturm Ruger .44 caliber Super Blackhawk pistol bearing serial number 85-15383, said firearms having previously traveled in interstate commerce, in violation of Title 18, United States Code, Section 922(g)(1)."

And Count Nine charges you with, once again, a Felon in Possession of Firearms, and reads in part as follows:

"That on or about November, 1992, in the Eastern District of Michigan, Southern Division, ERIE ADAMS, defendant herein, having previously been convicted of a crime punishable by a term of imprisonment exceeding one year, to wit: carrying a concealed weapon,

did knowingly and unlawfully possess firearms, that is,

"-one loaded Taurus 9mm semi automatic pistol bearing serial number TJC24499

"-one loaded Sears 20 gauge shotgun bearing serial number Q140986

"-one loaded High Standard 12 gauge shotgun having no serial number,

said firearms having previously traveled in interstate commerce in violation of Title 18, United States Code, Section 922(g)(1)."

Now, that took me quite a while, Mr. Adams. But have you read all of these before yourself?

THE DEFENDANT: No, that's the first time I seen it.

THE COURT: Ever had them read to you?

THE DEFENDANT: Pardon me? Yes.

THE COURT: Other than myself reading them to you.

Did you discuss all of these counts, that is One, Three, Five, Six, Seven and Nine with your counsel?

THE DEFENDANT: Yes.

THE COURT: Prior to standing up here and talking to me today, have you talked with Mr. Mann and Mr. Henry?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you feel you understand that with which you are charged in those six counts?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right.

You do understand, of course, you are presumed innocent at this point and that presumption stays with you unless and until you are convicted?

THE DEFENDANT: Yes, your Honor.

THE COURT: You have a right to a trial in front of the Court or a trial before a jury, at which time, in order to convict you, the Government will have to satisfy that factfinder, that jury or that Judge, of your guilt beyond a reasonable doubt; do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand also that you are entitled to have counsel represent you from beginning to end of all of these proceedings. And in that representation, you and counsel would have a right to confront and cross-examine any of the witnesses that would be brought in here against you; you and your counsel would have a right to call your own witnesses and compel that

production here to testify on your own behalf if you went to trial; do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand also that you have a right not to be compelled to incriminate yourself?

By that, I merely mean if you went to trial, you would have a right not to testify if you chose to do so, and such could not be used against you and the jury would have to be informed of that fact; do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: You understand also, if you enter,a plea of guilty to Counts One, Three, Five, Six, Seven and Nine of this Indictment, that tnere isn't going to be a trial of any kind, and you would have given up those rights to which the Court has just made mention; do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And if the Court accepts your plea to any one or all of these counts, that that is going to constitute a conviction on those counts; do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Adams, how do you plead to Count One, which charges you

with being involved in a conspiracy to distribute cocaine?

THE DEFENDANT: Guilty.

THE COURT: How do you plead to Count Three, which charges you with the use and carrying a firearm during drug trafficking?

THE DEFENDANT: Guilty.

THE COURT: How do you plead to Count Five, which charges you with assaulting or impeding a federal agent?

THE DEFENDANT: Guilty.

THE COURT: How do you plead to Count Six, which charges you with being a felon in possession of firearms?

THE DEFENDANT: Guilty.

THE COURT: And Count Seven, which charges you with the same thing, that is, being a felon in possession of firearms?

THE DEFENDANT: Guilty.

THE COURT: And count Nine, which charges you with the same thing again, that is, being a felon in possession of firearms?

THE DEFENDANT: Guilty.

THE COURT: Now, Mr. Adams, those are a lot of pleas of guilty to a lot of counts, six counts.

Why are you pleading guilty to all those six counts, because you are guilty?

THE DEFENDANT: Yes.

THE COURT: I don't want you to plead guilty for any other reason other than the fact that you are guilty of those counts; do you understand that, don't you?

THE DEFENDANT: Yes, your Honor.

THE COURT: Well, let's talk about that a minute then, if we will.

In Count One you are charged with Conspiracy to Distribute Cocaine during the month of November, the 28th of November here in the Eastern District of Michigan. That is, you were named with Albert Johnston, Louis Holmes and Gregory Holmes.

What was it that you did during that period of time in this conspiracy with any one or more of these individuals that you know was a violation of the law? Tell me in your own words.

THE DEFENDANT: The Holmes boys --

THE COURT: Speak up now.

THE DEFENDANT: The Holmes boys are innocent.

THE COURT: The Holmes boys are what?

THE DEFENDANT: Are innocent.

THE COURT: All right. They are innocent. But we are not talking about them, talking about you.

You told me you were guilty of this count, you are guilty.

THE DEFENDANT: I went over to Wayburn to collect money Brian owed me.

THE COURT: You what?

THE DEFENDANT: Went over to Wayburn Street to collect money that Brian owed me.

THE COURT: Brian who?

THE DEFENDANT: McClendon.

THE COURT: What money?

THE DEFENDANT: The money he owed me for drugs.

THE COURT: What kind of drugs?

THE DEFENDANT: The three kilos.

THE COURT: Three kilos of what?

THE DEFENDANT: Cocaine.

THE COURT: Are you telling me then that you were involved in cocaine trafficking, buying and selling?

THE DEFENDANT: Yes.

THE COURT: All right.

In the month of November, 1992, here in Michigan?

THE DEFENDANT: Yes.

THE COURT: Was Albert Johnston involved in that with you also?

THE DEFENDANT: Yes.

THE COURT: And somebody else that you named, whose name was Brian; is that right?

THE DEFENDANT: Yes. He's the snitch. He's the informant.

THE COURT: The snitch, as you said?

THE DEFENDANT: Right.

THE COURT: And it was some of your duties to pick up money?

THE DEFENDANT: No, I didn't have no duties, your Honor.

THE COURT: What did you do with the narcotics or with the cocaine?

THE DEFENDANT: Distributed them.

THE COURT: At the time that you did this, Mr. Adams, were you aware at that time that this was against the law?

THE DEFENDANT: Yes, your Honor.

THE COURT: Let's go to Count Three, which charges you with the use and carrying firearms, charging you on that same date, November 28, 1992, in the Eastern District of Michigan, with unlawfully using and carrying a couple of firearms in elation to this drug trafficking crime; is that true?

THE DEFENDANT: Yes, your Honor.

THE COURT: What kind of weapons?

THE DEFENDANT: Nine millimeter and .38. Can I explain?

THE COURT: Three-eight-oh and a Berreta?

THE DEFENDANT: Berreta. I didn't know the name of it.

THE COURT: Semi-automatic?

THE DEFENDANT: Yes.

I have been shot twice, your Honor, that's why I was carrying them.

THE COURT: You were carrying those weapons for what reason?

THE DEFENDANT: Can I say something?

THE COURT: Certainly.

THE DEFENDANT: When you are dealing with drugs, you don't need firearms.

THE COURT: You don't need firearms when you are dealing in drugs?

THE DEFENDANT: No, you do not.

THE COURT: Why do so many carry them?

THE DEFENDANT: I carried firearms because I have been shot twice. That's why I was carrying it.

THE COURT: Well, you were carrying them while you were dealing drugs, to protect yourself; is that right?

THE DEFENDANT: Right.

THE COURT: That takes care of that.

All right, let's go to Count Five. Count Five charges you on the same date, Mr. Adams, and that involves a Chevrolet Lumina van. So it charges -- What do you have to say about that one, that charges you with assaulting, impeding a federal agent, an agent by the name of Thomas Brandon, which you may have known him by that name or some other name.

Suffice it to say, did you have some kind of run-in with a Government agent, what turned out to be a Government agent on that day?

THE DEFENDANT: Thank you, your Honor. I didn't know it was a Government agent.

THE COURT: Not at the time. You found out later it was a Government agent?

THE DEFENDANT: Yes.

THE COURT: What happened on that occasion?

THE DEFENDANT: Agent Brandon, and I guess he was -- run up to my van dressed in all black.

THE COURT: The agent was dressed in all black?

THE DEFENDANT: Unh-huh, black hit man. I thought I was going to be killed.

THE COURT: He looked like a hit man to you?

THE DEFENDANT: I thought I was going to be killed.

I pulled over. Agent Brandon grabbed my hair, shot in the door.

I drove directly at him. I drove my car to the left, I drove to the right on the grass. He held on, shot in the door and got hurt. I was trying to get away from what I thought was a hit.

THE COURT: Suffice it to say, what he was trying to do, you were opposed to him doing it; is that right?

THE DEFENDANT: Yes.

Well, I guess he was -- must to have been trying to arrest me.

MS. DONOHUE: As part of the factual basis, the Government would also establish at trial Agent Brandon was attempting to arrest Mr. Adams after the --

THE COURT: Brandon would say he had made his presence known to him to effect an arrest?

MS. DONOHUE: Correct. His lights were flashing right in front on --

THE COURT: Mr. Adams resisted him and was trying to drive off, apparently?

MS. DONOHUE: That is correct.

THE COURT: Dragging him, was he?

MS. DONOHUE: That is correct.

THE COURT: You don't deny him --

THE DEFENDANT: I don't deny him shooting in the door.

THE COURT: He shot in the door?

THE DEFENDANT: He shot in the door. I don't deny this.

THE COURT: Of the Chevrolet Lumina that you were driving?

THE DEFENDANT: Right.

THE COURT: Well, let's talk about Count Six, which charges you with being a felon in possession of firearms on the same date, again November 28th. It charges you with possessing, knowingly possessing a Glendel .380 and the Berreta nine millimeter semi-automatic, and that

you were carrying those as concealed weapons.

Do you deny that?

THE DEFENDANT: No, your Honor.

THE COURT: You admit that?

THE DEFENDANT: Unh-huh.

THE COURT: You knew that was against the law; did you not?

THE DEFENDANT: Yes, your Honor.

THE COURT: Then Count Seven and Nine charges you with being a felon in possession of firearms again. However, in each instance, on an unknown date, and November, they charged you with different weapons.

And number -- Count Number Seven, it charges you with a Browning magnum .12 gauge shotgun, a loaded Remington 30.06, and then a IMI Desert Eagle .44 magnum semi-automatic and a Sturm Ruger .44 caliber Super Blackhawk.

Now, did you possess those during that period of time?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you were carrying those as concealed weapons; is that not correct?

THE DEFENDANT: Well, your Honor --

MS. DONOHUE: Let me clarify that.

Carrying concealed weapons was a prior felony conviction.

THE COURT: That is right. You had been previously convicted; is that right?

THE DEFENDANT: Yes, your Honor.

THE COURT: What was that prior felony conviction in, when?

THE DEFENDANT: What?

THE COURT: What was --

THE DEFENDANT: CCW.

THE COURT: Carrying a concealed weapon?

THE DEFENDANT: Right.

THE COURT: And you knew, having that kind of conviction, you weren't supposed to have weapons; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: So it was against the law and you knew that; is that right?

THE DEFENDANT: Yes, your Honor.

THE COURT: Then Count Nine, same type of offense, charging you with being a felon in possession of firearms the month of September.

This time it charges you with having been previously convicted of this CCW. You, knowingly, unlawfully possessed a Taurus nine millimeter, Sears 20-gauge shotgun and High Standard 12-gauge shotgun; is that correct?

THE DEFENDANT: Yes.

THE COURT: At one time or another in November, you had those as well; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you knew that was a violation of the law because you had been a convicted felon; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Adams, has anybody threatened you in order to get you to enter a plea of guilty to these six counts?

THE DEFENDANT: No, your Honor.

THE COURT: Has anybody made any promises to you other than what we find in the Rule 11 Plea Agreement?

THE DEFENDANT: No, your Honor.

THE COURT: If there were no Rule 11 Plea Agreement, what would be the maximum charge or maximum term of imprisonment that could be imposed on you for conspiracy to distribute cocaine, which is Count One?

THE DEFENDANT: Forty years.

THE COURT: Forty years. That is correct.

How about Count Three, which is the use and carrying a firearm during drug trafficking, what would that be?

THE DEFENDANT: Five years.

THE COURT: Five years consecutive; is that not correct?

THE DEFENDANT: Yes.

THE COURT: And Count Five, which is assaulting and impeding a federal agent, what is the maximum?

THE DEFENDANT: Five years.

THE COURT: And then on Counts Six, Seven and Nine, which is a felon in possession of firearms, what is the maximum that could be imposed?

THE DEFENDANT: Ten years each.

THE COURT: Pardon me?

THE DEFENDANT: Ten years each.

THE COURT: And then also we have a statutory minimum incarceration, do we not, of five years? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: What would be the statutory maximum fine that could be imposed upon you?

THE DEFENDANT: One million dollars.

THE COURT: That is right, one million dollars.

But you apparently have entered into a Rule 11 Plea Agreement; have you not?

THE DEFENDANT: Yes, your Honor.

THE COURT: And the Court has before it a six-page document entitled "Rule 11 Plea Agreement," with attachments.

And on the last page thereof, Page 6, I see Mr. Martin's signature by Mr. Parker's, Chief Assistant Ms. Donohue's

signature and Mr. Mitchell's signature. Then, on the bottom line, I see that signature I have known 45 years, Milton Henry's, and Mr. Mann's, whom I have known almost as long, on the next line.

Who signed two more lines up above that?

THE DEFENDANT: I did, your Honor.

THE COURT: All right. And that's dated 4-26-93, which I guess is today.

Did you sign this, Mr. Adams, only after having discussed the contents of this Rule 11 Plea Agreement at length and in depth to your satisfaction with your counsel, Mr. Mann and Mr. Henry?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you feel you understand every paragraph in there without me going over them chapter and verse?

THE DEFENDANT: Yes, your Honor.

THE COURT: And, according to the Rule 11 Plea Agreement, among other things is your promise to offer a guilty plea to Counts One, Three, Five, Six, Seven and Nine, a number of counts of this indictment, and you have done that and the Court will take those under advisement.

Did you have any agreement with the Government at all relative to the amount of fine that could be imposed upon you?

THE DEFENDANT: No.

THE COURT: Which means then, if the Court saw fit, the Court would sentence you by way of fine, of anything from zero up to and including how much?

THE DEFENDANT: One million dollars.

THE COURT: Did you have an agreement with the Government as to the amount of time that can be imposed on you in incarceration?

THE DEFENDANT: Twelve years, three months.

THE COURT: Eighty-seven months plus. Eighty-seven plus 60 months.

Consecutive?

THE DEFENDANT: Yes, your Honor.

THE COURT: So that adds up to a minimum of 147 months; is that right?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. You understand also that upon your release there will be a statutory period of supervised release?

THE DEFENDANT: Yes, your Honor.

THE COURT: And that would be how many years to how many years?

THE DEFENDANT: I don't know that.

THE COURT: Two to three years.

THE DEFENDANT: Two to three years.

THE COURT: All right. You understand also there will be a special assessment of $50.00 on each count, a

total of $300.00 that would be imposed against you?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, did you make any further or other promises to the Government, Mr. Adams?

THE DEFENDANT: No, your Honor.

THE COURT: Is that true, Mr. Henry and Mr. Mann?

MR. MANN: Yes, your Honor.

MR. HENRY: Yes, your Honor.

THE COURT: Did the Government make any further or other promises to you, Mr. Adams?

THE DEFENDANT: No, your Honor.

THE COURT: Is that true, other than dismissing the balance of the counts?

MS. DONOHUE: Yes.

THE COURT: All right. The Court will take the Rule 11 Plea Agreement under advisement, finding as it does that the plea is freely, voluntarily and understandably made; that there is a factual basis for the plea on each count; that the defendant understands the nature of the charges against him, the penalties to which he is exposed; and that his rights have been explained to him. And the matter will be referred to the Probation Department for a Presentence Investigative Report.

Do I gather that Mr. Adams is in custody?

MS. DONOHUE: Yes, your Honor.

Due to the fact that he has been in custody since November, his attorneys have requested an expedited sentence if possible.

MR. MANN: One other thing. Just for the record, I would like to state it's my understanding that Count Three is the only consecutive count. That Counts Five, Six, Seven, Nine are all concurrent with Count One, your Honor.

MS. DONOHUE: That is true.

THE COURT: And it's so set forth. I guess this is Judge DeMascio's case.

MS. DONOHUE: Yes.

MR. HENRY: There is one other matter that I am obligated to bring up.

I have been out to visit Mr. Adams. He is being held out in Macomb County at the present time. He previously had reasonably nice accommodations, with the ability to have a tape recorder and television and so forth, but he was moved down to some maximum security area. And I talked to the administrator out there asking him to let him go back where he was. And they apparently indicated that the Government wanted him there because of threats or some possible threats.

I have discussed that with my client and he doesn't feel that there are. He really wants the Court to enter an order to permit him to go back.

THE COURT: I will certainly enter the Order to the extent, advising the United States Marshals to look into this and find out where they can put him, where his best interests are served as well as the institutional authorities, best interests are served.

I can hardly interfere in their internal affairs in that regard. I will ask them to look into that, Mr. Henry, and see what can be done.

MR. HENRY: In view of the fact he doesn't mind, he knows what they are saying, he doesn't mind being in the general population. If we only had word from the Court.

MS. DONOHUE: Just so the Court is aware, we have four or five different cases with cross-defendants here in various prisons on various floors. It has presented a problem.

THE COURT: They have probably kept him in Macomb to make him more accessible to counsel, rather than sending him out to Milan.

MR. MANN: It was our understanding, after talking to the Administrator, that maximum security is for prisoners who had

some sort of ticket. Mr. Adams has no tickets. He has been a model inmate.

THE COURT: I will contact the marshalls office, and the United States Attorney's office can check into that and see to it, see what should be done.

MR. HENRY: Thank you, your Honor.

- - -

REPORTER'S CERTIFICATE

I, BARBARA C. CHATMAN, Official Court Reporter for the United States District Court of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Barbara C. Chatman
BARBARA C. CHATMAN, CSR-0070

Dated: May 5, 1995
Detroit, Michigan

# APPENDIX E

UNITED STATES COURT OF APPEALS
FOR EASTERN DISTRICT OF MICHIGAN

ORDER DENYING MOTION FOR
REVOCATION OF PRETRIAL DETENTION

Sixth Circuit Case №. 96-2291
Filed January 11, 1993

Pages E-1 thru E-5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Eastern Dist. of Michigan Filed 1/11/93

| | | |
|---|---|---|
| ERIE ADAMS, *Petitioner,* | ) | |
| | ) | Criminal Case |
| | ) | No. 92-CR-81100 |
| vs. | ) | |
| | ) | |
| UNITED STATES OF AMERICA, *Respondent.* | ) | Honorable Robert E. DeMascio |

---

**ORDER**

The defendant, Erie Adams, received a telephone call from a man who agreed to he and another man would buy 3 kilograms, approximately 6-1/2 pounds, of cocaine from the defendant. The caller was a confidential informant working with the Bureau of Alcohol, Tobacco and Firearms (ATF). The other buyer was an undercover ATF agent. During the telephone conversation, they settled on the purchase price and the location of the exchange. ATF agents immediately began a surveillance of that location, an address on Wayburn Street. These agents saw defendant arrive in a Lumina Van, enter the residence on Wayburn and then return to the van where he waited the arrival of

the "buyers," who arrived together, parking behind the defendant's van. The informant went to the residence where he used a telephone to speak to defendant. After some discussion, defendant agreed that the other buyer, the undercover agent, could test the cocaine before paying for it. One albert Johnson, who had arrived at approximately the same time as the "buyers" brought the cocaine from the residence on Wayburn to the undercover agent's vehicle. When the agent took possession of the cocaine, he gave a prearranged signal to the agents on surveillance. Agent Branden, who led the surveillance team, monitored the entire transaction through the body microphone worn by the undercover agent. Moreover, during this time, Branden was in radio contact with all the agents on surveillance in the area.

Immediately upon receiving the undercover agent's signal Branden drove his vehicle, described as having its blue light on, to the front of defendant's van. He and another agents got out of the vehicle. They were wearing raid uniforms which identified them as "ATF". Other agents involved in the arrest were similarly identified. Branden approached defendant's wan, shouting "Police" and ordered defendant to exit the van.

Instead, defendant put his vehicle in reverse and started to back up. Branden attempted to remove the ignition key but defendant continued his backward movement. Branden then attempted to grab defendant's hair, but defendant refused to stop. Defendant then put his vehicle in forward and started to drive away. Branden hung on to the side of the van as defendant was increasing his speed driving over various curbs and lawns to effect his escape. Seeing the defendant reach for a gun on the seat. Branden fired one round into the car. He then lost his grip and fell to the street, injuring his head and hands. Defendant's van was eventually blocked by another agent's vehicle. Defendant exited his van and ran through various backyards and over fences separating nearby homes. Agent Perryman gave chase, eventually apprehending and arresting defendant. As he retraced the path of the pursuit, Perryman found a gun and cellular telephone on the ground. An additional weapon was found in the van. Agents then obtained a search warrant for defendant's residence and business, where they seized a number of additional weapons, various ammunition, and money.

This evidence was produced by the government at a hearing before a

magistrate on the government's motion to detain defendant without bond. Because defendant faces a fifteen year minimum term of imprisonment, there is a statutory concern that he poses a risk of flight, 18 U.S.C. § 3142(f)(1)(C). Further, the violent circumstances of the offense, including the defendant's possession of and attempt to use a gun as well as the involvement of a narcotic drug, indicate that he poses a hazard to the community. 18 U.S.C. § 3142(g)(1). It is very clear that the defendant when approached by Agent Branden made an attempt to flee from the agents. By pulling away with an agent's arm in the van, defendant accepted a substantial risk of causing injury to the agent; and in fact the agent was injured in falling from the van. The testimony that defendant attempted to reach for a gun is creditable; the gun was in fact located in the van. After abandoning the van, defendant continued to attempt an escape on foot. When he ran, defendant certainly knew then that the police were attempting to make an arrest. Defendant's actions make it clear that he not only presents a significant risk of flight but is also a very clear danger to the community. He was an armed man involved with distribution of 2 kilograms

of cocaine. He had additional firearms and ammunition in his home and office. A magistrate faced with this evidence could reach no other conclusion.

The defendant attempted to present testimony that an electronic tether would be an alternative to detention and assure his presence when required. An electronic tether does not, however, diminish the risk of flight. The officer from Pretrial Service testified at the hearing that the tether can be out. The defendant has not presented evidence that persuades the court that there are viable alternative to assure his presence when required. Defendant's conduct on the evening on November 28, 1992, after he most assuredly knew that the police and not strangers were taking him into custody makes it apparent that he is a clear danger to the community and that he is determined to flee from prosecution.

The magistrate's order will be affirmed:

**IT IS SO ORDERED.**

/s/ Robert E. DeMascio
Robert E. DeMascio
United States District Judge

Dated: January 11, 1993
Port Huron, Michigan

# APPENDIX F

UNITED STATES COURT OF APPEALS
FOR EASTERN DISTRICT OF MICHIGAN

EXCERPTS FROM TRANSCRIPT OF
DETENTION HEARING

Sixth Circuit Case №. 96-2291
Filed December 15, 1992

Pages F-1 thru F-6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | | |
|---|---|---|
| ERIE ADAMS, *Petitioner,* | ) | Eastern Dist. of Michigan Filed 12/15/92 |
| | ) | Criminal Case No. 92-CR-81100 |
| vs. | ) | |
| | ) | Detroit, MI |
| UNITED STATES OF AMERICA, *Respondent.* | ) | Thurs., Dec. 10, 1992 Judge DeMascio |

---

**DETENTION HEARING**

BEFORE THE HONORABLE THOMAS CARLSON, MAGISTRATE JUDGE

TRANSCRIPT ORDERED BY: TIMOTHY CRAWFORD

APPEARANCES:

For the Plaintiff:
United States Attorney Office
By: DIANE DONOHUE
817 U.S. Courthouse
Detroit, MI 48226

For the Defendant:
BY: ROBERT MANN
3500 David Stott Building
Detroit, MI 48226

Transcribed by: Lynn L. Spietz
13810 Courtland
Oak Park, MI 48237

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GOVERNMENT - None DEFENDANT - None

Q. Somebody told you that he was in a van.
A. That's correct.
Q. Now, while you were listening, you -- you said that you saw Mr. Adams -- you didn't see him, but you -- somebody told you Mr. Adams went to a house.
A. That's correct.
Q. Do you know how many people were observing that house at that period of time, how many agents?
A. That particular time, I -- I know of only of Special Agent George Dahl observing it at that time.
Q. Okay. So if I understand your testimony correct, despite the fact that you had at least 10 officers around, only one person would have been -- one agent would have been in a position to see Mr. Adams go into that house, is that what you're telling us?
A. That's correct.
Q. Okay. And that he would relay the information to somebody else, is that right?
A. That's correct.
Q. Now, nobody -- you saw any narcotics on Mr. Adams when went from

that van to that house, isn't that correct?
A. That's correct.
Q. In other words, you hadn't seen Mr. Adams commit any crime before you appeared -- strike that.
Nobody had seen Mr. Adams commit any crime at all...



before he arrived at that location, isn't that correct?
A. That's correct, at least on our -- our surveillance.
Q. That's what I'm asking you. And who was the officer who was at that location observed Mr. Adams go into tho house?
A. His name is George Dahl, D-a-h-l.
Q. All right. And despite the fact that nobody had seen him commit a crime, you went up to perfect an arrest, isn't that correct?
A. That's correct.
Q. And as I understand your testimony, these other 10 officers were in some locations so as to assist in his arrest, is that correct, Mr. Adams' arrest, is that correct?
A. As well as others, yes.

Q. And then you saw this car with a gentleman sitting in it, correct; this van, right?
A. That's correct.
Q. You didn't know whether that was the same van that Mr. Adams was in or not, isn't that correct?
A. No, that's not correct. I did know that that was the van that he was in.
Q. Well, you knew that was the van, but you weren't sure that was Mr. Adams' van, is that right?
A. No. I -- like I said, I was told that Mr. Adams was in that van.
Q. What I'm saying is you personally didn't know, you...

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...just been overcome, and also believes that the evidence is clear and convincing that there are no conditions that would assure the safety of the community. The Court is just frankly concerned that the Defendant, who would have the financial resources to plea if he wanted and is facing a large sentence at this point, could flee and -- and would not hesitate to use force if -- if that were necessary in order to -- to effect that flight, and, therefore, will grant the Government's motion to detain

the Defendant, and hold him pending trial.

Now, if you want to appeal, I think, Mr. Mann, or counsel, that you would go to --

MR. MANN: We do want to appeal.

MR. CRAWFORD: Yes, we do, Judge.

THE COURT: -- you would -- you'd go to JudgeDeMascio, I think, because it has been assigned to him already.

MR. MANN: Thank you.

THE COURT: Yeah. And let's see. We've set -- we have no pretrial, and we have already completed the arraignment, right?

MS. DONOHUE: That's correct, you Honor.

THE COURT: Okay. So that takes care of Mr. Adams.

(Hearing concluded.)

I certify that the foregoing is a correct transcript of the proceedings held in the above-entitled matter.

DATED: December 15, 1992

/s/ Lynn L. Spietz
Lynn L. Spietz, Transcriber

Supreme Court, U.S.
FILED
JUN 22 1998
CLERK

(2)

No. 97-1721

# In the Supreme Court of the United States

OCTOBER TERM, 1997

ERIC ADAMS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*

JOHN C. KEENEY
*Acting Assistant Attorney General*

ELIZABETH D. COLLERY
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HPP

## QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to grant certiorari to review the denial by a court of appeals of a certificate of appealability.

2. Whether the court of appeals erred in denying petitioner a certificate of appealability in his challenge, pursuant to 28 U.S.C. 2255, to his conviction under 18 U.S.C. 924(c).

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

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No. 97-1721

ERIE ADAMS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The order of the court of appeals denying petitioner a certificate of appealability is unreported. Pet. App. A1. The order of the district court denying petitioner's motion under 28 U.S.C. 2255 is also unreported. Pet. App. C1-C10.

### JURISDICTION

The order of the court of appeals was entered on May 16, 1997. A petition for rehearing was denied on January 29, 1998. Pet. App. B1. The petition for a writ of certiorari was filed on April 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count I); using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (Count III); assaulting a federal agent, in violation of 18 U.S.C. 111 (Count V); and three counts of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g) (Counts VI, VII, and IX). He was sentenced to 87 months' imprisonment on Counts I, VI, VII and IX, to be served concurrently, and a consecutive sentence of 60 months' imprisonment on Count III. Pet. App. C1. Petitioner did not appeal. Pet. 7.

After this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), petitioner filed a motion under 28 U.S.C. 2255 challenging the validity of his guilty plea to the Section 924(c) count. The district court denied the motion, Pet. App. C1-C10, and the court of appeals denied a certificate of appealability, *id.* at A1.

1. On November 28, 1992, petitioner agreed to sell three kilograms of cocaine to a confidential informant working with the Bureau of Alcohol, Tobacco, and Firearms (ATF). Petitioner arrived at the residence where the sale was to occur in a Lumina van, entered the residence, and then returned to the van. The informant then arrived, accompanied by an undercover ATF agent. The two men parked behind petitioner's van, and the informant went into the residence, from which he telephoned petitioner, who was using a cellular phone inside his van. Petitioner agreed that

the buyers could test the cocaine. Albert Johnston, a co-conspirator, brought the cocaine out of the house to the undercover agent's vehicle. The agent took possession of the cocaine, following which he gave a prearranged signal to other agents to arrest petitioner. Pet. App. E1-E2; Presentence Investigative Report (PSR) 6.

ATF agents approached petitioner's van, shouted "police," and ordered him to exit. Instead, petitioner put his vehicle in reverse and started to drive away. An ATF agent grabbed petitioner's hair, but petitioner drove off with the agent hanging onto the side of the van. During the escape attempt, petitioner reached for a gun on the passenger seat of his van, and the agent fired one shot into the van. The agent lost his grip and fell to the street, injuring his head and hands. When the van was stopped by another car, petitioner exited and ran through various backyards and over fences. Following petitioner's apprehension and arrest, ATF agents found a gun and cellular telephone on the ground and another weapon on the passenger seat of the van. Pet. App. E2-E3; PSR 6-7.

2. Petitioner was indicted and charged with ten offenses.[1] He entered into a plea agreement with the government under Federal Rule of Criminal Procedure 11(e)(1)(C). Def. Mot. to Vacate Conviction Pursuant to U.S.C. § 2255, at 2 (filed May 23, 1996). At his

---

[1] In addition to the offenses to which he pleaded guilty, see page 2, *supra*, petitioner was charged with distribution of cocaine, in violation of 21 U.S.C. 841 (Count II); use of a telephone to facilitate a drug offense, in violation of 21 U.S.C. 843(b) (Count IV); and two counts of being a convicted felon in possession of ammunition, in violation of 18 U.S.C. 922(g)(1) (Counts VIII and X). See Indictment, Crim. No. 92-81100 (E.D. Mich. S. Div., filed Dec. 8, 1992).

change of plea hearing, the district court informed petitioner that he had been charged in Count III with "[u]se and [c]arrying" of two firearms "during and in relation to a drug trafficking crime." Pet. App. D7-D8. Petitioner acknowledged that he had discussed that count with his counsel, *id.* at D11, and repeatedly admitted his guilt of the offense in open court. *Id.* at D14-D15, D17 (petitioner acknowledges that he used and carried weapons "in relation to" his drug trafficking crime on November 28, 1992). Petitioner also stated, however, "I have been shot twice, your Honor, that's why I was carrying them [*i.e.*, firearms]," *id.* at D17, and volunteered, "When you are dealing with drugs, you don't need firearms," *id.* at D18. The following exchange then occurred:

> THE COURT: Well, you were carrying them [*i.e.*, the guns] while you were dealing drugs, to protect yourself; is that right?
>
> [PETITIONER]: Right.
>
> THE COURT: That takes care of that.

*Id.* at D18. Petitioner did not appeal from his convictions or sentence.

3. In *Bailey* v. *United States*, 516 U.S. 137, 150 (1995), this Court held that "[t]o sustain a conviction under the 'use' prong of § 924(c)(1), the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime." Active employment includes uses such as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire a firearm." *Id.* at 148. By contrast, the possession of a firearm—without more—does not constitute a "use,"

nor does "placement of a firearm to provide a sense of security or to embolden." *Id.* at 149.

4. On April 24, 1996, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA or the Act), Pub. L. No. 104-132, 110 Stat. 1214. Title I of the Act made changes to the law governing motions for collateral relief for federal prisoners under 28 U.S.C. 2255. Section 102 of the Act amended 28 U.S.C. 2253 to require a prisoner to obtain a certificate of appealability before appealing from a district court's denial of his Section 2255 motion. The new provision states that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under Section 2255." 110 Stat. 1217, 28 U.S.C. 2253(c)(1)(B) (Supp. II 1996). A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 110 Stat. 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996).

5. On May 23, 1996, petitioner filed a motion under 28 U.S.C. 2255, seeking to vacate his guilty plea to the Section 924(c) charge in light of *Bailey*. Def. Mot. to Vacate Conviction Pursuant to U.S.C. § 2255.[2] Petitioner argued that he did not "use" a firearm under *Bailey* and that there was no factual basis to conclude that he was "carrying" a firearm "in relation to" a drug trafficking offense. The district court denied the motion, holding that "petitioner 'carried' the firearm found in his van" because he transported it in his

---

[2] Petitioner's motion also challenged his guilty plea to Count Five (assaulting a federal agent). The district court rejected that claim, Pet. App. C5-C10, and petitioner does not renew it in this Court.

van to the drug transaction, and it was available and within petitioner's reach during that transaction. Pet. App. C3. The district court also rejected petitioner's claim that the weapons were not carried "in relation to" a drug trafficking offense, finding that "it was reasonable for the court to conclude by a preponderance that the weapon in [petitioner's] van furthered the crime of conspiracy, using it to protect himself during the drug deal." *Id.* at C4-C5.

6. Petitioner filed a notice of appeal, which was treated by the court of appeals as a request for a certificate of appealability. The court denied the certificate. Pet. App. A1.

**ARGUMENT**

Petitioner contends (Pet. 1-2, 19-20) that the court of appeals erred in denying him a certificate of appealability. As petitioner notes (Pet. 11-12), that contention presents the threshold question whether this Court has jurisdiction to grant certiorari to review a court of appeals' denial of a certificate of appealability. In *Hohn* v. *United States*, No. 96-8986 (June 15, 1998), the Court held that it has jurisdiction under 28 U.S.C. 1254(1) to review the denial of a certificate of appealability. The Court should not exercise that jurisdiction here, however, because petitioner's underlying claim does not warrant this Court's review.

A certificate of appealability may issue only when the applicant has made "a substantial showing of the denial of a constitutional right." AEDPA § 102, 110 Stat. 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996). Petitioner claims (Pet. 13-22) that his constitutional rights were violated because there was no factual

basis to support his guilty plea on the Section 924(c) charge. That fact-bound claim lacks merit.

To gain relief on a defaulted claim, petitioner would have to show that "constitutional error in his guilty plea colloquy has probably resulted in the conviction of one who is actually innocent." *Bousley* v. *United States*, 118 S. Ct. 1604, 1611 (1998) (internal quotation marks omitted). A mere deficiency in the factual basis is not sufficient, under *Bousley*, to justify collateral review of a defaulted claim, however, even if it is assumed that such a Rule 11-based claim is cognizable under Section 2255. Cf. *United States* v. *Timmreck*, 441 U.S. 780 (1979) (deficiency in Rule 11 procedure not cognizable under Section 2255). Here, in any event, there was a sufficient factual basis for petitioner's plea, and petitioner has made no other showing of "actual innocence." Thus, under *Bousley*, he is ineligible for collateral review of any defaulted constitutional claim that he might assert.

The factual basis for petitioner's plea of guilty to using or carrying a firearm during and in relation to a drug trafficking crime was adequate. Petitioner transported guns in his van to a location where he distributed three kilograms of cocaine. Pet. App. C3, E1-E3. Following petitioner's arrest after he fled from the van, ATF agents found a gun on the ground and another on the passenger seat of the van. *Ibid.*; PSR 7. Petitioner acknowledged at his change of plea hearing that he "carried" the guns "while [he was] dealing drugs, to protect [him]self." See *id.* at D18.

Those facts are more than sufficient to support petitioner's plea to carrying a firearm during and in relation to a drug trafficking crime. Petitioner repeatedly admitted at his plea hearing that he "carried" the guns. See Pet. App. D17, D18, D20-D21.

And this Court has recently made clear that a person who, like petitioner, "knowingly possesses and conveys firearms in a vehicle * * * which the person accompanies" "carries a firearm" within the meaning of Section 924(c). See *Muscarello* v. *United States*, No. 96-1654 (June 8, 1998), slip op. 1.

Petitioner's contention (Pet. 14-18) that he did not carry the guns "in relation to" the drug sale is unpersuasive. This Court has explained that the phrase "in relation to" requires that "the firearm must have some purpose or effect with respect to the drug trafficking crime." *Smith* v. *United States*, 508 U.S. 223, 238 (1993). Here, the guns served the purpose that they serve in "the ordinary case under § 924(c)(1)," "facilitat[ing] the offense by providing a means of protection." *Ibid.* (internal quotation marks omitted). Although petitioner disavowed that drug dealers "need" firearms, he acknowledged at his change of plea hearing that he carried the guns "to protect [him]self" during the drug sale. See Pet. App. D18.

Even if the factual basis supporting petitioner's plea were insufficient, that deficiency would not entitle him to a certificate of appealability. An inadequate factual basis would violate petitioner's rights under Federal Rule of Criminal Procedure 11(f) but would not violate his "constitutional" rights as required for him to merit a certificate. See 110 Stat. 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996).

Petitioner's attempt (Pet. 15-16, 19) to transform his Rule 11 claim of an inadequate factual basis into a constitutional claim that his plea was not knowing and voluntary, see *Henderson* v. *Morgan*, 426 U.S. 637 (1976), is unavailing. The district court repeatedly informed petitioner at his change of plea hearing that the statute required use or carrying "in relation

to" drug trafficking. See Pet. App. D7, D17. Petitioner acknowledged that he had discussed the charges with his counsel and, in open court, admitted his guilt of the crime. See page 4, *supra*. Those circumstances raise a presumption that petitioner was informed of the nature of the charges against him. *Bousley*, 118 S. Ct. at 1608-1609; *Henderson*, 426 U.S. at 647.

Nothing in the record rebuts that presumption. Given petitioner's acknowledgement that he carried the guns "to protect [him]self" while "dealing drugs," Pet. App. D18, his earlier statement that "[w]hen you are dealing with drugs, you don't need firearms," *ibid.*, cannot be viewed as a "denial" (see Pet. 13, 15, 16, 19) of the "in relation to" element of the offense. Neither the discussion at petitioner's change of plea hearing, see Pet. App. D1-D30, nor subsequent legal developments, *e.g.*, *Smith*, *supra* (expounding on meaning of phrase "in relation to"), suggest that petitioner misunderstood or was misinformed of the legal meaning of the "in relation to" requirement when he pleaded guilty. Cf. *Bousley*, 118 S. Ct. at 1609 (plea constitutionally invalid when defendant was misinformed of an element of the offense or when defendant, counsel, and court misunderstood an element because of subsequent legal developments).[3]

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[3] Petitioner cannot rely on this Court's clarification of the meaning of "use" in *Bailey*, *supra*, because petitioner's plea rested on his carrying the firearms, not his using them. See Pet. App. C2-C4, D17-D18; pp. 4, 6, 7, *supra*. Cf. *Bousley*, 118 S. Ct. 1609, 1611-1612 (defendant's plea under Section 924(c) unintelligent when he was misinformed about meaning of "use" and indictment did not charge "carrying"). And, although petitioner "reserve[d]" (Pet. 15 n.6) the issue whether or not he was properly informed of the meaning of "carries," this Court's

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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decision in *Muscarello, supra*, is fully consistent with the understanding of that term at petitioner's change of plea hearing.